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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

METROPOLITAN EDISON COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY and PENNSYLVANIA ELECTRIC COMPANY,
Petitioners,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., requires the Nuclear Regulatory Commission to consider and evaluate effects on the psychological health of area residents resulting from their fears concerning the operation of a nuclear power plant, even if the Commission determines that the actual risk of such operation will not be significant.*

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* In addition to the parties listed in the caption of this petition, the Nuclear Regulatory Commission and the United States of America were respondents in the court below. Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company are subsidiaries of General Public Utilities Corporation. GPU Service Corporation, Saxton Nuclear Experimental Corporation and GPU Nuclear Corporation are also subsidiaries of General Public Utilities Corporation.

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v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("petitioners") hereby petition for a writ of certiorari to review the Amended Judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The opinions of the court of appeals are not yet published. They are reproduced in Appendix A, *infra*.

JURISDICTION

The Amended Judgment of the court of appeals was rendered without opinions on April 2, 1982, Judge Wilkey

dissenting;[1] it is reproduced in Appendix D, *infra*. A somewhat modified version of the Amended Judgment was issued by the court of appeals with its opinions on May 14, 1982. (App. A at 29a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"). Sections 2, 101 and 102 of NEPA, 42 U.S.C. §§ 4321, 4331, 4332, are reproduced in Appendix F, *infra*.

STATEMENT OF THE CASE

Petitioners are the owners of a two-unit nuclear power plant near Middletown, Pennsylvania, known as Three Mile Island Nuclear Station, Units 1 and 2 ("TMI-1" and "TMI-2"). The Nuclear Regulatory Commission ("NRC") issued an operating license for TMI-1 in 1974. TMI-1 went into operation shortly thereafter and, subject to periodic shut-downs for refueling and maintenance, such operations continued for approximately five years. An operating license for TMI-2 was issued in 1978, and it went into operation that year.

At the time of the accident at TMI-2 on March 28, 1979, TMI-1 was shut down for refueling and scheduled maintenance. TMI-1 was not involved in the accident. Nevertheless, the NRC took the extraordinary step of issuing immediately effective orders—without prior notice or hearing—requiring that TMI-1 remain shut down until after an adjudicatory hearing to consider certain specified

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[1] The April 2 Amended Judgment substantially altered and replaced an initial Judgment issued without opinions by the court of appeals on January 7, 1982. The January 7 Judgment is reproduced in Appendix E, *infra*.

safety issues, including particularly plant design and procedures, emergency planning, management capability and operator training.[2] In addition, the Commission stated that it had not determined whether issues such as psychological distress could be legally relevant to the TMI-1 proceeding. It therefore directed any party wishing to raise such issues to submit briefs on the question of whether NEPA or the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, requires consideration of psychological distress.[3]

Respondent People Against Nuclear Energy ("PANE") sought to intervene in the restart hearing and proposed to litigate two contentions relating to psychological distress. PANE's Contention No. 1 alleged in essence that as a result of the TMI-2 accident, its members had suffered post-traumatic psychological distress manifested in feelings of anxiety, tension, fear and helplessness and in physical symptoms such as skin rashes, aggravated ulcers, and skeletal and muscular problems. PANE further alleged that renewed operation of TMI-1 would perpetuate and aggravate the distress. Contention No. 2 alleged that the accident has undermined citizen confidence in community institutions and has made it difficult to attract desirable businesses and residents to the TMI area. According to PANE, renewed operation of TMI-1 will exacerbate these tendencies and will cause

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[2] On July 2, 1979, the NRC issued a brief order requiring that TMI-1 remain shut down until after a public hearing on the issue of restart and further order of the Commission. 44 Fed. Reg. 40,461 (1979). On August 9, 1979, the NRC issued a further order prescribing the format for the restart hearing and specifying the issues to be heard. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 N.R.C. 141 (1979).

[3] *Metropolitan Edison Co., supra* n.2, 10 N.R.C. at 148.

severe harm to the stability, cohesiveness and well-being of communities in the vicinity of the reactor.[4] After considering extensive briefs discussing both NEPA and the Atomic Energy Act, the NRC split 2-2 on the question of whether PANE's contentions should be admitted into the TMI-1 restart proceeding.[5] The procedural effect of the decision was to exclude PANE's contentions and, because PANE had no other contentions, to exclude PANE itself from the restart proceeding. PANE thereupon sought review of the NRC's order in the court of appeals pursuant to the jurisdiction conferred by 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239(b).

On appeal, PANE argued that its contentions were cognizable under NEPA and the Atomic Energy Act and that the NRC was required to admit and allow litigation of the contentions in the TMI-1 restart proceeding. Petitioners intervened in the court below and argued, along with the NRC, that the Commission's ruling should be affirmed because psychological distress and resultant community well-being are not cognizable under NEPA or the Atomic Energy Act. The case was argued on November 17, 1981, before a panel composed of Circuit Judges Wright and Wilkey and Senior Circuit Judge McGowan.

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[4] PANE's contentions are reproduced verbatim in Appendix G, *infra*.

[5] *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-80-39, 12 N.R.C. 607 (1980). A copy of this Order, with the separate views of each Commissioner, is reproduced in Appendix B, *infra*. One of the five seats on the Commission was vacant at the time of the 2-2 vote. After appointment of a fifth Commissioner, the NRC reconsidered the matter and a majority of the Commissioners voted to adhere to the result previously reached and to continue excluding PANE's contentions from the restart proceeding. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-81-20, 14 N.R.C. 593 (1981). A copy of this Order is reproduced in Appendix C, *infra*.

On January 7, 1982, the court of appeals issued a brief Judgment, without opinions, from which Judge Wilkey dissented. (App. E, *infra*). The Judgment directed the NRC to prepare an environmental assessment of the effects of restarting TMI-1 on the psychological health of neighboring residents and on the well-being of surrounding communities. The NRC was further ordered to determine on the basis of the environmental assessment whether a full environmental impact statement ("EIS") was required under NEPA. The Judgment also directed the NRC to prepare a statement of the reasons for its determination that psychological health is not cognizable under the Atomic Energy Act.[6] Finally, the court of appeals enjoined the NRC from making a decision on the restart of TMI-1 until it had "complied with the requirements of" NEPA as described in that Judgment.

On April 2, 1982, the court of appeals issued an Amended Judgment superseding the January 7 Judgment, again with no opinions.[7] (App. D, *infra*). The Amended Judgment ordered the NRC to determine, using its own procedures, whether significant new circumstances or information concerning psychological health impacts of operating TMI-1 have arisen since the preparation of the original EIS at the time TMI-1 was licensed. If so, the NRC is required to prepare a supplemental environmental impact statement ("SEIS") considering both psychological health effects and the effects on the well-being of surrounding communities. In light of

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[6] The NRC prepared such a statement and submitted it to the court of appeals on March 30, 1982.

[7] Judge Wright's majority opinion on NEPA explained that the January 7 Judgment "was replaced on April 2, 1982 and is no longer in effect." (App. A. at 8a n.4).

"current operating difficulties at TMI-1,"[8] the Amended Judgment vacated the injunction against making a restart decision, but required the NRC to give PANE and the court of appeals 30 days' notice if it intended to authorize restart "prior to complying with its obligations under NEPA." The Amended Judgment said nothing about the Atomic Energy Act.

On May 14, 1982, the court of appeals finally issued its opinions in the case, along with another Amended Judgment that differed somewhat from the April 2 Amended Judgment. (App. A).[9] Judge Wright, joined by Judge McGowan, held that under NEPA an agency is required to evaluate effects on human health and that "health encompasses psychological health." (App. A at 13a). Judge Wright concluded that although NEPA does not encompass "mere dissatisfactions" arising out of "social

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[8] The court of appeals was referring to the corrosion found in some of the steam generator tubes at TMI-1—a problem unrelated to the issues in the restart proceeding itself. Petitioners' best estimate is that the steam generator problem will be resolved on a schedule that would allow restart of TMI-1 before the end of 1982. Petitioners believe that the court of appeals' decision on psychological distress is likely to be the "critical path" item that, unless reversed, will delay restart of TMI-1. In this connection, the NRC Staff has taken the position that in the absence of a special exemption, present NRC regulations will require further public hearings on the psychological distress issue, whether or not the Commission determines that an SEIS is required. *See* NRC Staff's Answer to Licensee's Motion With Respect to Psychological Health Issue, filed with the NRC on June 10, 1982. Such a hearing, if required by the Commission, would add additional time to the restart proceeding.

[9] Judge Wilkey, joined by Judge McGowan, wrote an opinion affirming the NRC's determination that psychological distress is not cognizable under the Atomic Energy Act. Judge Wright dissented from that holding. Petitioners are not seeking review of the court of appeals' holding under the Atomic Energy Act.

opinions, economic concerns, or political disagreements," it does apply to "post-traumatic anxieties, accompanied by physical effects and caused by fears of recurring catastrophe." (App. A at 16a-17a). The court further held that the NRC's "continued exercise of supervisory responsibility" over operation and maintenance of TMI-1 constitutes major federal action within the meaning of NEPA, thereby imposing upon the Commission a continuing duty to comply with NEPA's requirements. (App. A at 19a). [10] Under the court's view of this continuing duty, the NRC is obligated to determine whether "significant new circumstances or information" have arisen with respect to the potential psychological health effects of operating TMI-1 since the facility was licensed. (App. A at 30a). If the result of this threshold determination is affirmative, then the NRC must prepare an SEIS on psychological health effects. Finally, Judge Wright concluded that PANE's Contention No. 2—dealing with community cohesiveness, stability and well-being—concerns so-called "secondary" socio-economic impacts that need not be considered under NEPA unless an SEIS is otherwise required. The court held that if an SEIS is required to evaluate psychological health effects, the document must also include an analysis of the secondary impacts alleged in PANE's Contention No. 2. (App. A at 17a-18a).

Judge Wilkey dissented at length from the court's holding under NEPA. He pointed out that the majority's

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[10] Petitioners believe that the court's holding with respect to the NRC's continuing duties under NEPA is erroneous. As Judge Wilkey pointed out, the majority's conclusion is tantamount to holding that the NRC is engaged in a proposed major federal action "every second of every day," which may "significantly increase the NEPA burden on all regulatory agencies in the future." (App. A. at 49a, 50a).

decision "requires consideration of an 'impact' on health—psychological stress—which has never before been held cognizable under NEPA." (App. A at 31a). To the contrary, in Judge Wilkey's view, the court of appeals' decision is squarely inconsistent with the other federal court cases that have considered the issue. (App. A at 39a-45a).

In addition, Judge Wilkey found the majority's reading of NEPA unwise, unwarranted and likely to have a serious adverse impact on the nuclear industry and on all federal agencies subject to NEPA's requirements. PANE's argument, he noted, is not that operation of TMI-1 will affect human health because of dangers inherent in operation of a nuclear power plant, but rather "that individuals' *fears* of an accident at the plant, combined with their lack of confidence in the NRC, will lead to an extension of the psychological stress allegedly caused by the TMI-2 accident." (App. A at 37a) (emphasis in original). Thus instead of assessing the risk of a proposed activity, the agency "is now required to assess *how people perceive and react to the risk*." *Id.* (emphasis in original). In the case of TMI-1, this means that the NRC must "determine whether people so fear renewed operation" that such operation should not go forward, regardless whether the NRC's assessment of "the actual risk indicated that the impact on health will not be significant." *Id.* Judge Wilkey believed that this "takes NEPA far beyond its intended purpose," and substitutes the views of area residents—"no matter how scientifically ignorant and divorced from reality those views (fears) may be"—for the judgment that Congress has already made in the case of nuclear power. (App. A. at 38a). With respect to the congressional judgment on nuclear power, Judge Wilkey quoted this Court's holding that "[n]uclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try

nuclear energy . . . ." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). Thus in Judge Wilkey's view, the effect of the majority's holding "would be to let any special interest group effectively repeal an act of Congress if it could whip up sufficient hysteria." (App. A at 38a).

Judge Wilkey was also concerned about the practical difficulties of complying with the majority's decision. He pointed out that the issue is not how much psychological damage was caused by the TMI-2 accident, but "how much *additional* damage will result from TMI-1's restart." (App. A at 40a) (emphasis in original). This he thought to be "particularly ephemeral and speculative since it is not subject to *measurement* at all." (App. A at 40a-41a) (emphasis in original). Therefore, the NRC will be forced to "*predict* how every individual in the TMI area will react to the restart." (App. A at 41a) (emphasis in original). In summary, Judge Wilkey concluded that Congress did not intend NEPA "to encompass an effect which not only varies from individual to individual, but which is also entirely subjective." *Id.*

Finally, Judge Wilkey demonstrated that the logic of the court's decision cannot be limited to TMI or even to the NRC and nuclear power. He listed four other NRC licensing proceedings in which psychological distress has been raised as an issue by intervenors since the court issued its initial Judgment on January 7, 1982. (App. A at 57a-59a). [11] These proceedings made it clear to Judge Wil-

[11] In addition to the four proceedings listed by Judge Wilkey, psychological distress has recently been raised in the Perry, Limerick and Midland operating license proceedings. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), NRC Docket Nos. 50-440, 50-441; *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), NRC Docket Nos. 50-352, 50-353; *Consumers Power Co.* (Midland Plant, Units 1 and 2), NRC Docket Nos. 50-329, 50-330.

key that the majority's decision "will not be deemed limited or sui generis, but rather as inviting protests based on psychological stress to be raised in all nuclear proceedings." (App. A at 59a). Judge Wilkey also found no logical reason why the majority's rationale could not be applied to coal mines, urban housing and other projects subject to NEPA. Indeed, he stated that the "majority rationale must apply to the psychological effects of *all* actions of *all* agencies, which is broad coverage indeed." (App. A at 38a n.17) (emphasis in original).

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted in this case because the court of appeals' decision is in conflict with decisions of other courts of appeals and because it constitutes an unprecedented and unwarranted extension of NEPA that is likely to have a substantial adverse impact upon NRC licensing activities and upon the federal government in general. In addition, the decision below is inconsistent with the teachings of this Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). Unless the decision is promptly reversed, the NRC will be required under NEPA to consider psychological distress in connection with TMI-1 and will also be faced with psychological distress contentions in its licensing activities at other nuclear plants. The decision may also be applied to any other federal agency that undertakes or regulates activities capable of engendering fear, anxiety or psychological distress among members of the public. The lower court's novel reading of this important federal statute merits Supreme Court review.

I. The Decision Below Is In Conflict With Decisions Of Other Courts Of Appeals

In extending NEPA to the realm of public fears, anxiety and psychological distress, the court of appeals has

taken an unprecedented step that is at odds with prior decisions of the Courts of Appeals for the Second, Seventh and Eighth Circuits.

In *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), the Second Circuit noted that psychological reactions to a proposed jail should not be considered under NEPA:

> For the most part [plaintiffs'] opposition is based upon a psychological distaste for having a jail located so close to residential apartments, which is understandable enough. *It is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement.* [10]

471 F.2d at 833 (emphasis added). The court's footnote 10 explained further:

> [10]Unlike factors such as noise, which can be related to decibels and units which measure duration, or crime, in which crime statistics are available, *psychological factors are not readily translatable into concrete measuring rods.*

Id. n.10 (emphasis added). The same rationale applies here. As in *Hanly*, the psychological effects alleged by PANE cannot be meaningfully quantified and weighed in a NEPA cost/benefit analysis.

The Seventh Circuit has reached the same conclusion. In *First National Bank of Chicago v. Richardson*, 484 F.2d 1369 (7th Cir. 1973), a proposed jail was again attacked under NEPA, and the court held that public fears and sensibilities are not cognizable under NEPA. The court acknowledged that plaintiffs' concerns were "none the less real because psychological," 484 F.2d at 1375, but it concluded that:

> As regards public "sensibilities" aroused by criminal defendants, we question whether such factors, even if amenable to quantification, are properly cognizable in the absence of clear and convincing evidence that the safety of the neighborhood is in fact jeopardized.

Id. at 1380 n.13. The point of this case is clear. While the underlying bases of community fears—such as increased crime—may be cognizable under NEPA, the fear in and of itself is not. [12]

In *Nucleus of Chicago Homeowners v. Lynn*, 524 F.2d 225 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), the Seventh Circuit followed the *First National Bank* case and held that fear of low-income housing is not cognizable under NEPA:

> To the extent that this claim can be construed to mean that HUD must consider the fears of the neighbors of prospective public housing tenants, we seriously question whether such an impact is cognizable under NEPA.

524 F.2d at 231.

The lower court's decision is also inconsistent with a more recent decision of the Eighth Circuit. In *Como-Falcon Coalition, Inc. v. United States Department of Labor*, 465 F. Supp. 850 (D. Minn. 1978), plaintiff sought to enjoin the establishment of a Job Corps center in St.

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[12] The actual safety of TMI-1 was exhaustively considered in the restart hearing that went forward before an Atomic Safety and Licensing Board of the NRC. The evidentiary hearing consumed more than six months, with more than 150 witnesses and a transcript exceeding 26,000 pages. Virtually every plausible safety concern associated with the TMI-2 accident was thoroughly aired. The Licensing Board has so far issued two partial recommended decisions favorable to restart encompassing some 1,145 pages.

Paul, Minnesota. In rejecting plaintiff's assertion that an EIS was required, the district court stated:

> The impact a Job Corps center might have on the security of an urban environment is an emotionally charged issue. Members of plaintiff understandably fear an influx of disadvantaged youth in their neighborhood when reports from other Job Corps centers portend increased criminal activity . . . . The incidence of crime as an environmental impact cannot be determined by a comparison of emotional fervor. *Because plaintiff's fears, while understandable, are not based on a significant likelihood of danger to the community, the Court concludes that the Department of Labor acted reasonably in determining that the proposed Job Corps center would not appreciably affect public safety in the neighborhood.*

465 F. Supp. at 861-62 (emphasis added). On appeal, the Eighth Circuit affirmed, noting particularly that "[t]he social and economic factors raised by the Coalition's complaint are not encompassed within the provisions of NEPA . . . ." *Como-Falcon Community Coalition, Inc. v. United States Department of Labor*, 609 F.2d 342, 345 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980).

In summary, the lower court's decision is a clear departure from the judicial consensus that community fears and psychological distress are not within the scope of NEPA.[13] Judge Wright attempted to distinguish the cases cited above on the grounds that they involved "socioeconomic anxieties" resulting from "people pollution," and not "medically recognized impairment of . . .

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[13] The court of appeals' decision here is also inconsistent with its own earlier decision in *Maryland-National Capital Park & Planning Comm'n v. United States Postal Service*, 487 F.2d 1029 (D.C. Cir. 1973). There, the court held that some questions of esthetics do not lend themselves to NEPA analysis because "[l]ike psychological factors they 'are not readily translatable into concrete measuring rods.' " 487 F.2d at 1038, *quoting Hanly v. Kleindienst*, *supra*, 471

psychological health" resulting from a "traumatic nuclear accident," raising fears of "the holocaust potential of an errant nuclear reactor." (App. A at 15a, 16a).

Judge Wilkey criticized the majority's departure from prior case law at some length. (App. A at 39a-45a). In particular, he discussed Judge Wright's distinction between mere "socioeconomic anxieties" and "medically recognized impairment of psychological health" in a passage that bears repeating here:

> This purported distinction is destroyed by the majority's own finding that it is a "simple fact that effects on psychological health are effects on the health of human beings." The assertion that mere "anxieties" about nearby matters other than nuclear power are not effects on psychological health is entirely unsupported and, I submit, obviously unsupportable. It is a callous assumption indeed to believe that persons living close to a prison or in a high-crime area cannot suffer very real psychological harm from fear of physical violence—and highly illogical, also, since the casualty total from crime is a gruesome, proven fact, while the casualty total from nuclear accidents so far, fortunately, remains at zero.
>
> The majority's decision to ignore these many cases seems based ultimately on nothing more than a *political determination* that fears that federal actions will "change the character of the neighborhood, reduce property values, and increase the dangers of crime" are simply not worthy of consideration. Fears of nuclear power, on the other hand, must be considered, presumably because the majority considers them legitimate. *In each case, however, what we are*

F.2d at 833 n.10. The court of appeals' decision is also inconsistent with district court decisions in *Monarch Chemical Works, Inc. v. Exon*, 466 F. Supp. 639, 657 (D. Neb. 1979), and *Trinity Episcopal School Corp. v. Romney*, 387 F. Supp. 1044, 1078-79 (S.D.N.Y. 1974), *rev'd in part on other grounds*, 523 F.2d 88 (2d Cir. 1975).

> *dealing with are fears and anxieties; if NEPA embraces fears and anxieties in one, it must in all.*

(App. A at 41a-42a) (emphasis in original).

There is no basis in law or logic for distinguishing the present decision from the prior cases holding that psychological distress is not cognizable under NEPA. Petitioners believe that Judge Wilkey was clearly correct in concluding that the majority's decision is "unwarranted, unprecedented, and inconsistent with relevant decisions in this and other circuits." (App. A at 34a).

II. The Decision Below Will Have A Significant Adverse Impact On The NRC And Other Federal Agencies

The fundamental holding of the court below is broad indeed—that NEPA requires consideration of effects on human health and that "in the context of NEPA, health encompasses psychological health." (App. A at 13a). Although there are passing references in the majority's opinion to the fact that the TMI-2 accident was "unique," the majority expressly disclaims any intent "to draw a bright line" delineating the future effect of its decision in other contexts. (App. A at 16a, 17a). In fact, Judge Wilkey was able to find nothing in the majority opinion that furnishes a principled basis upon which the effect of the decision could logically be limited to TMI. As he stated in his dissent, "NEPA consideration therefore should be mandatory in *all* licensing decisions, if psychological stress is cognizable at all." (App. A at 48a) (emphasis in original). Moreover, even if one were prepared to accept the majority's logic of distinguishing "socioeconomic anxieties" from "medically recognized impairment of psychological health," this threshold test would prove difficult or impossible to apply in practice. The NRC would be required to consider and resolve endless disputes about

whether predicted psychological distress in particular locations would be merely a "socioeconomic anxiety" rather than a real "impairment" of psychological health that is "medically recognized." The disruptive effect on the business of the NRC would be substantial. [14]

If the court of appeals' decision stands, the NRC could be faced with psychological distress contentions in licensing actions at all plants around the country, regardless whether the plants are safe and regardless whether there is any basis in fact for the alleged fears and stress. Surrounding any nuclear plant there is a segment of the population that fears and distrusts nuclear power; there will inevitably be challenges by resourceful anti-nuclear groups all over the country alleging anxiety and distress that is "severe" and "medically recognizable," as PANE alleges here. Indeed, the process has already begun. As noted above, such challenges have already been made by intervenors in seven different NRC licensing proceedings. *See* n.11, *supra*, and App. A at 57a-59a. The progeny already spawned by the lower court's decision clearly substantiate Judge Wilkey's warning that the decision would amount to "a court-imposed paralysis of nuclear power at Three Mile Island, and potentially elsewhere as well." (App. A at 31a). [15]

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[14] In the present case, for example, the NRC has been attempting to evaluate psychological distress since the initial Judgment was issued on January 7, 1982. As of May 13, 1982, the NRC had spent more than $400,000 on the effort and still was not in a position to make the threshold determination concerning the "significance" of the alleged psychological distress. *See* Request of Respondent NRC for Expeditious Issuance of the Court's Opinions, filed with the court of appeals on May 13, 1982.

[15] This petition addresses primarily the broad impact of the decision below on the NRC and other agencies generally in the performance of their regulatory functions. However, the effect of the decision is most acute at TMI, where it threatens, in Judge Wilkey's words, a

Moreover, the court's decision is not likely to be limited to the NRC and nuclear power. Emotions often run high when the federal government proposes to build a jail, or a dam, or a highway, or an experimental reactor, or a new nuclear weapons system. As Judge Wilkey pointed out so forcefully, the scope of NEPA's mandate logically cannot vary according to the kind of federal action proposed. Nor can NEPA's requirements depend on whether the court of appeals believes "the *source* of the psychological harm is acceptable." (App. A at 44a) (emphasis in original). Thus, the government could be required to predict and quantify the psychological effects of an area- or nationwide missile system or an expressway through a residential area. Many such projects would doubtless become mired for years in disputes and litigation over the adequacy of the agency's assessment of psychological consequences, which by their nature are highly subjective and essentially unprovable.

The decision below sets a particularly unfortunate precedent because of the difficulties and uncertainties inherent in any attempt to predict psychological distress meaningfully in an environmental assessment or an EIS. The agency necessarily would be dealing with the reactions of individuals subject to myriad daily psychological influences, such as problems at home or work. Question-

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"paralysis of nuclear power." The consequences of such a paralysis are enormous. Petitioners advised the court of appeals that replacement power costs have been running at approximately $14 million per month while TMI-1 is forced to remain shut down. In addition, orders of the Pennsylvania Public Utility Commission make a portion of the funds needed for TMI-2 clean-up contingent upon restart of TMI-1. No one disputes that the public interest requires prompt clean-up and decontamination of TMI-2. *See* Public Utilities' Memorandum In Opposition To PANE's Motion To Permit Supplemental Briefing, filed in the court below on April 15, 1982. The impact of the court's decision on TMI alone is sufficient to warrant Supreme Court review.

naires and surveys asking people about the proposed project could be suggestive and would be difficult to interpret. Even if the government hired teams of psychiatrists and clinical psychologists to analyze each individual in the area of a proposed project, it could not with complete assurance attribute an individual's psychological or emotional reactions to a particular causal event. While some objective indicators might be measured to give the agency some idea of the existing general stress level in an area, these indicators would not necessarily show what additional stress would be *caused* by the proposed project. As Judge Wilkey stated, the requirements imposed by the court below are "certain to produce long delays and [are] perhaps *ultimately impossible to fulfill.*" (App. A at 68a) (emphasis added).

There are other disturbing ramifications of the court of appeals' decision. Psychological distress, if it occurs at all, is the product of people's *perceptions*, not the actual safety of a proposed project. And perceptions are often inconsistent with reality. Groups opposed to a project can easily alter perceptions and engender fears and anxiety by disseminating inflammatory material about the project, thereby creating an issue to use against the project in NEPA litigation. Exaggerated media reports also tend to spread and exacerbate public anxiety and apprehension. Sometimes stress is caused almost exclusively by misinformation. In the case of TMI-2, for example, it is likely that public concern arose primarily from the Governor's evacuation advisory and from reports of a possible hydrogen bubble explosion. Yet it is now agreed that the evacuation advisory was based on a gross misunderstanding by the NRC of reported radiation levels, and that the hydrogen explosion could not have occurred. *See* App. A at 46a & n.39; Report of the President's Commission on the Accident at Three Mile

Island — The Need for Change: The Legacy of TMI, at 118, 126-30 (Oct. 1979). If the NEPA decision-making process is to turn on anxieties and fears caused by misperceptions and erroneous information, then NEPA will have become totally divorced from reality and its scope will be limited only by the imagination.

The clear implication of the lower court's holding is that the NRC could not license a plant otherwise found safe if some local residents have conceived a fear and distrust of nuclear power that is sufficiently severe and intense. As Judge Wilkey pointed out, this would subordinate the scientific judgment of the NRC to the "*views of the population itself on the very desirability of the activity* . . . ." (App. A. at 37a-38a) (emphasis in original). In this sense, the court of appeals' decision is inconsistent with the teachings of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), where this Court stated:

> Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment. In the meantime courts should perform their appointed function.

435 U.S. at 557-58 (emphasis in original). NEPA should not be transformed into a device through which residents' fear of nuclear power is used to nullify the congressional determination "to at least try nuclear energy."

Petitioners submit that NEPA was never intended to require federal agencies to predict and evaluate fears and emotions, however deeply felt, or to prepare psychological impact statements on major federal actions. The holding by the District of Columbia Circuit to the contrary is, as Judge Wilkey stated, a "novel hurdle, well designed to delay the development of nuclear power (contrary to the national policy determined by Congress and the Executive), [and] is thoroughly consistent with this court's track record of using NEPA to delay the development of important energy sources." (App. A at 34a). *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 557-58 (1978). To prevent federal agencies from proceeding with necessary projects until they have ascertained, analyzed and quantified the possible psychological and emotional reaction to the project lies far beyond NEPA's boundaries. When agency decisions must be based on public perceptions rather than reality, we have surely reached a point that, in the words of this Court, "borders on the Kafkaesque." *Id.* at 557. The court of appeals' decision cannot be allowed to stand.

CONCLUSION

Petitioners cannot compose a better conclusion for this petition than the paragraph Judge Wilkey chose to conclude his dissent:

> We have thus come a long way in fifty years, from a time when the President of the United States was widely and enthusiastically applauded for declaring: "The only thing we have to fear is fear itself." Now the fear itself necessitates an environmental assessment. All risky activity must grind to a halt in the interim. Inaction has become epidemic, and delay is maximized. I do not believe the Congress intended

> NEPA to constrain federal action on these psychological and emotional bases. Accordingly, I respectfully dissent.

(App. A at 69a).

Petitioners believe that the court of appeals' decision is so clearly wrong and Judge Wilkey's dissent is so clearly correct that summary reversal is warranted. *See Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980); *Northern Indiana Public Service Co. v. Porter County Chapter of the Izaak Walton League*, 423 U.S. 12 (1975). If the Court believes that summary reversal is inappropriate, then the case should be set for briefing and argument on the merits.

Respectfully submitted,

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